U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7330372

Date: JAN. 24, 2020

Appeal of California Service Center Decision

PETITION: Form I-129, Petition for L-1A Manager or Executive

The Petitioner operates as a computer and electronics wholesaler and exporter. It seeks to temporarily employ the Beneficiary as its chief operating officer under the L-1A nonimmigrant classification for intracompany transferees who are coming to be employed in the United States in a managerial or executive capacity. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the California Service Center revoked the approval of the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in the United States in a managerial or executive capacity. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we find that the Petitioner did not overcome the Director's conclusion. Therefore, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

Under U.S. Citizenship and Immigration Services regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Petitioner initially claimed that the Beneficiary "is experienced in executive responsibilities." However, on appeal, the Petitioner does not pursue its original claim and instead cites to the statutory definition of managerial capacity, claiming that the Beneficiary "manages" the U.S. entity and performs "managing duties" that involve overseeing personnel and managing the U.S. market as "an important function of the foreign entity." Therefore, we will evaluate the merits of the Petitioner's latest claim that the Beneficiary would be employed in a managerial capacity.

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Section 101(a)(44)(A)(ii) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

On the other hand, the term "function manager" applies generally when a beneficiary does not primarily supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

Based on the statutory definition of managerial capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). The Petitioner must also prove that the Beneficiary will be *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

The description of the job duties must clearly describe the duties performed by the Beneficiary and indicate whether such duties are in a managerial or an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the employing

company's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the Beneficiary's actual duties and role in a business.

A. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

In the petition form the Petitioner stated that it was established in 2004 and currently operates with a staff of four employees. However, the Petitioner provided an organizational chart depicting six employees, including the company president at the top of the hierarchy, followed by the Beneficiary who is shown as overseeing a "General Secretary," an "Administration" position, an "Adm. Director," and an "Accounting Director." The Petitioner did not provide job duty descriptions for the Beneficiary's subordinates or explain how the staffing hierarchy depicted in the organizational chart would support the Beneficiary and relieve him from having to allocate his time primarily to non-managerial job duties.

Despite initially approving the petition, upon subsequent review of the record, the Director determined that the Petitioner did not demonstrate eligibility and therefore issued a notice of intent to revoke (NOIR) based on the lack of evidence showing that the Beneficiary's U.S. employment would be in a managerial capacity. The Director noted that the Petitioner's organizational chart does not show any supervisory or professional positions and found that there is no evidence that the Petitioner either has subordinates of its own or that it relies on the foreign entity's staff to carry out the operational job duties that comprise the various functions over which the Beneficiary has oversight responsibilities. Although the Petitioner was afforded 30 days to provide evidence in opposition to these adverse findings, it did not respond to the NOIR. Therefore, the Director revoked approval of the petition reiterating the adverse findings that were previously cited in the NOIR.

On appeal, the Petitioner contends that the Beneficiary "'controls the work of other professionals and managerial employees and manages an essential function within the organization.'" The Petitioner does not specify what essential function the Beneficiary manages and instead states that the Beneficiary hired four employees – a president, a manager, a general secretary, and an accounting director – who possess bachelor's degrees and "assist in running" the U.S. operation. The Petitioner did not explain why the Beneficiary was tasked with filling the position of president, which is depicted as the Beneficiary's superior, nor does the Petitioner reconcile the inconsistency between the petition, which shows four employees, and the Petitioner's statement on appeal, which indicates that the Petitioner actually has five employees, including the Beneficiary. The Petitioner must resolve this staffing discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We also observed discrepancies between the organizational chart the Petitioner initially provided and the staffing as described on appeal. Namely, the organizational chart indicates that [redacted] assumed the position of "Administration" at the time of filing; on appeal, however, the Petitioner

indicates that this same individual occupies the position of "manager." Further, on appeal the Petitioner does not include the position of "Adm. Director," despite including this position in the previously submitted organizational chart. In any event, the Petitioner does not provide evidence or information that enhances our understanding of the Beneficiary's role within the context of the Petitioner's organizational structure, nor does it clarify precisely who comprises that structure. Rather, the Petitioner raises a new claim on appeal, asserting that it has staff in Colombia who support its U.S. operation by providing assistance with "most administrative duties" as well as ten employees in China over whom the Beneficiary is claimed to have "ultimate responsibility." Although the Petitioner offers a photocopied informational packet containing its organization's business profile and information about its "international team," neither the packet nor the Petitioner's statement on appeal specifically identifies the support staff outside of the United States as part of organizational hierarchy, nor does the Petitioner provide the position titles and job duties of this additional purported support staff.

Furthermore, we note that a petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). In the present matter, even though the NOIR specifically inquired about the foreign entity's supporting role with respect to the U.S. operation, the Petitioner did not respond and instead offered new information on appeal, only after the revocation notice had been issued. The Petitioner did not explain why this information had not be offered sooner, nor did it provide relevant, probative, and credible evidence corroborating the new claim. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In sum, the Petitioner did not provide consistent information about its support staff and offered insufficient evidence to demonstrate that its staffing composition at the time of filing was sufficient to support the Beneficiary in a top-level position and to enable him to focus primarily on performing job duties that are in a managerial capacity.

B. Duties

We will also discuss the Beneficiary's job description to determine whether the Beneficiary would allocate his time primarily to managerial job duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In a supporting cover letter the Petitioner stated that the Beneficiary's duties will include: increasing the Petitioner's financial performance and market share; aligning "work and resource management" with the organization's goals and philosophy; assessing key performance indicators and major processes to ensure consistency and best practices throughout the organization; working with human resources to develop "management plans and strategies"; and overseeing the company's daily operations. As the Petitioner did not provide an organizational chart that included a human resources department or showed that the Petitioner had an employee who specifically designated to carry out human resources job duties, the claim that the Beneficiary would work with human resources in any capacity appears to be inconsistent with the Petitioner's staffing at the time of filing. As noted earlier,

inconsistencies in the record must be resolved through the submission of independent, objective evidence pointing to where the truth lies. *Ho*, 19 I&N Dec. at 591-92.

On appeal, the Petitioner provides an additional job description stating that the Beneficiary would perform the following job duties:

- Direct the Petitioner's marketing and establish marketing goals and strategies;
- Develop relationships with potential new clients;
- Establish policies and objectives to ensure that the Petitioner reaches foreign and U.S. markets;
- Review activity reports and financial statements;
- Revise goals in line with client demands and ensure that those goals are met;
- Supervise, evaluate, hire, fire, and promote employees;
- Organize, direct, and conduct marketing services for the entire organization;
- Perform activities to raise capital; and
- Direct and supervise project developments.

The Petitioner also states that the Beneficiary has "full and discretionary authority" over its administrative and personnel matters as well as its policies and strategies. The Petitioner did not, however, specify any goals, strategies, or policies that the Beneficiary has set or state how much of the Beneficiary's time would be allocated to these intermittent activities that would likely be performed periodically on a need basis and would not be categorized as the Beneficiary's daily tasks. Likewise, the Petitioner has not established that hiring, firing, and promoting employees would be among the Beneficiary's daily or even weekly activities, given that the Petitioner claims to have 4-5 employees.

Further, the Petitioner has not established that the employees who are depicted as the Beneficiary's subordinates are supervisory or professional employees so that supervising them and evaluating their respective performances would be deemed managerial-level job duties. Despite claiming that the Beneficiary oversees subordinates who possess bachelor's degrees, the Petitioner has not provided supporting evidence to substantiate this claim. Moreover, the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.[1] The Petitioner has not established that a bachelor's degree is actually necessary to perform the duties assigned to its manager, general secretary, or accounting director, despite what their respective position titles may suggest.

Although the job description also indicates that the Beneficiary has discretionary authority over "capital raising activities" and "directing and supervising project developments," it did not clarify the actual tasks involved in executing these broadly stated job responsibilities, nor did it state how frequently the Beneficiary would perform these undefined tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial in nature; otherwise meeting the

[1] In evaluating whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

definition of managerial capacity would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Furthermore, the fact that the Beneficiary will manage the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. Thus, while the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, these elements alone do not establish that the Beneficiary would be employed in a managerial capacity unless it shows that the duties of the proposed position would be primarily managerial in nature. Here, the Petitioner highlights the Beneficiary's discretionary authority and top placement within the organizational hierarchy, but it does not adequately describe the Beneficiary's proposed position or convey a meaningful understanding of the Beneficiary's activities in the course of their daily routine.

Lastly, although the Petitioner makes a brief reference to the Beneficiary's management of an essential function, it does not elaborate or provide sufficient evidence to support this claim. Whether a beneficiary is an "activity" or "function" manager turns in part on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See* Matter of Z-A-, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016). Absent a clear and credible breakdown of the time spent by the Beneficiary performing their duties, we cannot determine what proportion of the duties would be managerial, nor whether the Beneficiary is primarily performing the duties of a function manager. *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). As discussed above, the Petitioner does not provide a detailed delineation of the Beneficiary's duties or document what proportion would be managerial functions and what proportion would be non-managerial. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial capacity. *See, e.g*, section 101(a)(44)(A) of the Act (requiring that one "primarily" perform the enumerated managerial duties); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In light of the deficient job description the Petitioner provided and the lack of a detailed explanation as to how the Petitioner's existing staff would relieve the Beneficiary from having to spend his time primarily performing operational tasks, we are unable to conclude that the Beneficiary would be employed in a managerial capacity as claimed.

ORDER: The appeal will be dismissed.